LIBRARY
SUPREME COURT, U. S.

FILED
MAR 4 1974
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1194

TOYAH INDEPENDENT SCHOOL DISTRICT, et al.,
Petitioners,

v.

PECOS-BARSTOW CONSOLIDATED
INDEPENDENT SCHOOL DISTRICT, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, EIGHTH SUPREME JUDICIAL DISTRICT OF TEXAS

GEORGE HUME COFER,
1408 Capitol National Bank,
Austin, Texas 78701,
Counsel for Petitioners.

Of Counsel:

MAX E. RAMSEY,
415 N. Grant,
Odessa, Texas 79760,

A. R. ARCHER, JR.,
P. O. Box 265,
Monahans, Texas 79756.

February 28, 1974

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS — (214) 742-4257

INDEX

LIST OF AUTHORITIES ii

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 3

CONSTITUTIONAL PROVISION INVOLVED 3

DESIGNATION OF PARTIES 4

STATEMENT OF FACTS 4

REASONS FOR GRANTING THE WRIT 11

CONCLUSION 18

CERTIFICATE OF SERVICE 20

APPENDIX A (Original Opinion of 8th Court of Civil Appeals of Texas) A-1

APPENDIX B (Opinion of 8th Court of Civil Appeals of Texas on Motion for Rehearing) B-1

APPENDIX C (Orders of the Supreme Court of Texas) C-1

APPENDIX D (Per Curiam Opinion of 8th Court of Civil Appeals of Texas) D-1

APPENDIX E (Order of the 8th Court of Civil Appeals of Texas) E-1

Cases: **Page**

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S. Ct. 451 ..... 11, 15, 17

Brown v. New Jersey, 175 U.S. 172, 175 15

Casray Oil Corporation v. Royal Indemnity Company, 165 S.W. 2d 244, 141 Tex. 33, 169 S.W. 2d 955 11

First National Bank in Graham v. Corbin, 153 S.W. 2d 979 ..... 12, 13

Gevinson et al., v. Manhattan Construction Company of Oklahoma et al., 449 S.W. 2d 458 ..... 8-9, 12, 13

In re Murchison, 349 U.S. 133, 75 S. Ct. 623 18

National Association for the Advancement of Colored People v. Alabama, 357 U.S. 449, 78 S. Ct. 1163 ..... 11, 15, 17

In re Oliver, 333 U.S. 257, 68 S. Ct. 449 14

Reyna v. State, 206 S.W. 2d 651 11

Smock v. Fischel, 207 S.W. 2d 891 ..... 12, 13

Toyah Independent School District v. Pecos-Barstow Consolidated Independent School District, 466 S.W. 2d 377 ..... 5, 18

Statutes and Rules:

Article 2249, Revised Civil Statutes of Texas 11

Article 2687, Revised Civil Statutes of Texas 6

Article 6252-17, Revised Civil Statutes of Texas 6

Rule 324, Texas Rules of Civil Procedure 7, 8, 10, 12, 13, 14, 17

Rule 374, Texas Rules of Civil Procedure 8, 13

Title 28 U.S.C., Sec. 1257(3) 2

Title 28 U.S.C., Sec. 2101 ..... 3, 10

In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

TOYAH INDEPENDENT SCHOOL DISTRICT, et al.,

Petitioners,

v.

PECOS-BARSTOW CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, EIGHTH SUPREME JUDICIAL DISTRICT OF TEXAS

Petitioners Tom J. Cargill, Jim Valdez, Richard J. Compton, Ynez Contreras, Don Gass, Mrs. A. L. Gibson and Mrs. Viola Williams, individually and as resident tax-paying citizens living within the territorial confines of Toyah Independent School District and members of the Board of Trustees of Petitioner Toyah Independent School District of Reeves County, Texas, pray that a writ of certiorari issue to review the opinions and judgments of the Eighth Court of Civil Appeals of the State of Texas rendered in these proceedings on June 6, 1973 and January 9, 1974.

OPINIONS BELOW

1. Original opinion of the Court of Civil Appeals, Eighth Supreme Judicial District of Texas, dated June 6, 1973, reported in 497 S.W. 2d 455, appears as Appendix A, *infra.*

2. Opinion of the Court of Civil Appeals, Eighth Supreme Judicial District of Texas, on motion for rehearing, dated July 3, 1973, reported in 497 S.W. 2d 455, appears as Appendix B, *infra.*

3. Certified copy of orders of the Supreme Court of Texas refusing Petitioners' application for writ of error and overruling Petitioners' motion for rehearing thereon, dated October 17, 1973 and December 5, 1973 respectively, unreported, appears as Appendix C, *infra.*

4. Per Curiam Opinion of the Court of Civil Appeals, Eighth Supreme Judicial District of Texas, in response to Petitioners' motion to recall the mandate and stay the effectiveness thereof, dated January 9, 1974, unreported, appears as Appendix D, *infra.*

5. Order of the Court of Civil Appeals, 8th Supreme Judicial District of Texas, conditionally recalling and staying the effectiveness of the Mandate, dated January 9, 1974, unreported, appears as Appendix E, infra.

JURISDICTION

The orders and judgments of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas were entered on June 6, 1973 and January 9, 1974. After the June 6, 1973 opinion, the Petitioners filed an application for writ of error to the Supreme Court of the State of Texas. The Texas Supreme Court denied the application for writ of error and thereafter on December 5, 1973 overruled Petitioners' motion for rehearing thereon. This petition for certiorari is filed less than ninety (90)

days from the date of December 5, 1973. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(3).

QUESTIONS PRESENTED

1. Whether the action of the Texas Court of Civil Appeals in denying Petitioners the right to avail themselves of a state avenue of appeal, where, from the face of the record, they complied with the procedural requirements of the state regulating appeals, is consistent with the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

2. Whether the action of the Texas Court of Civil Appeals in conditionally staying the effectiveness of the mandate for a period of time thirty-five (35) days less than the time allowed by 28 U.S.C., Sec. 2101 within which to file application for writ of certiorari in this Court is consistent with the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

3. Whether the action of the Texas Court of Civil Appeals in ordering the automatic implementation of the mandate by June 1, 1974 regardless of whether this Court has finally disposed of Petitioners' application herein is consistent with the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment XIV, Sec. 1:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

DESIGNATION OF PARTIES

For convenience of the Court, Petitioners (Plaintiffs in the trial Court) and Respondents (Defendants in the trial Court) will be designated as follows:

1. Petitioners Tom J Cargill, Jim Valdez, Richard J. Compton, Ynez Contreras, Don Gass, Mrs. A. L. Gibson and Mrs. Viola Williams are resident tax-paying citizens living within the territorial confines of Toyah Independent School District and members of the Board of Trustees of Petitioner, Toyah Independent School Dsitrict of Reeves County, Texas. For convenience all Petitioners shall be referred to simply as Toyah School District.

2. The Respondents, comprising the Reeves County Board of School Trustees shall be referred to as the County Board.

3. The Respondents, comprising the Board of Trustees of the Pecos-Barstow Consolidated Independent School District shall be referred to as Pecos School District.

STATEMENT OF FACTS

The facts relevant to the questions presented by this petition are uncontroverted and they are therefore summarized here.

Under Texas law each county having more than one school district also has a County Board of School Trustees which, among other powers, has within its discretion, the power to annex any school district within the county, whose scholastics fall below 250, to another school district.

In this case, Toyah School District is an independent school district within Reeves County that never had 250 scholastics in any year during the entire 55 to 60 years of its existence. Pecos

School District is an independent school district in Reeves County, Texas that at all times material to this cause had more than 4300 scholastics.

On March 5, 1969 at a meeting of the County Board called for the purpose of considering the petition of Pecos School District to annex Toyah School District to it, the County Board, after ordering residents of Toyah School District from the meeting room, entered an order annexing Toyah School District to Pecos School District.

This order was upheld by the 143rd District Court of Reeves County, Texas, but on appeal to the Fourth Court of Civil Appeals sitting in San Antonio, Texas on the 21st day of April, 1971, the annexation order was set aside because it was adopted at an illegal meeting which had been closed to the public. This case was styled *Toyah Independent School District v. Pecos-Barstow Independent School District* and is reported in 466 S.W. 2d 377 (No Writ Hist.).

On May 5, 1971 Pecos School District re-urged its petition to the County Board to annex Toyah School District to it. The May 5, 1971 meeting was recessed and there were in all some six (6) sessions of the May 5, 1971 meeting which on August 13, 1971 resulted in the County Board again entering an order annexing Toyah School District to Pecos School District. Petitioners Cargill, Valdez, Compton, Contreras, Gass, Gibson and Williams individually as resident citizens within the territorial confines of the Toyah Independent School District and in their capacity as members of the Board of Trustees of Petitioner, Toyah Independent School District, within the time and in the manner prescribed by law filed suit in the 143rd District Court

of Reeves County, Texas to set aside the annexation order alleging that the annexation order was void, among other things, because one of the County Board members did not reside in the Commissioner's Precinct from which he was elected; because one of the integral sessions of the May 5, 1971 meeting of the County Board called for the purpose of annexing Toyah School District to Pecos School District was held in the private office of the Chairman of the County Board, same being in violation of Article 6252-17, Revised Civil Statutes of Texas and Article 2687, Revised Civil Statutes of Texas, which require that the meetings be held in public and at the office of the school superintendent of the County School Board; because three (3) of the County Board members had direct personal financial interests in the official act of annexation of Toyah School District to Pecos School District; that one of the County Board members was an official of Pecos School District and as such was proscribed by statute from participating as a County Board member in the annexation order in question; that one of the County Board members was a brother of one of the members of the Board of Trustees of Pecos School District and had actively joined in the efforts of Pecos School District to petition the County Board to annex Toyah School District to it; that all of said conflicts of interest were proved either by uncontroverted evidence or by stipulation of the parties and all of the conflicts of interest were condemned by the Constitution, Statutes and case law of the State of Texas.

The trial Court submitted one fact issue to the jury concerning the residence of one of the County Board members. The jury heard only evidence relating to that issue.

When the jury returned their verdict on the one issue, the

trial Court discharged them with the following remarks:

> "The Court: Very well. Mr. Bolinger, and members of the jury, your verdict will be received and filed in this case as the verdict *on this phase of the case. The other matters that are to be submitted to the Court are questions of law and this was the only issue of fact.*"

After the jury was discharged the trial Court then continued hearing evidence on all other phases of the case. Thereafter upon an adverse judgment, Petitioners filed eight (8) assignments of error in a motion for new trial in the trial Court complaining of the action of the trial Court relative to the submission of the only issue to the jury. No other assignments of error were included in the motion for new trial. These were overruled and an appeal was perfected to the Eighth Court of Civil Appeals of Texas sitting in El Paso. That Court on June 6, 1973, as reflected in its opinion, a copy of which is attached hereto and marked Appendix A, upheld the trial Court's judgment and in so doing refused to consider Petitioners' first sixteen points in their brief filed in that Court, which embodied all the complaints of error of the trial Court except those relating to the fact issue that the trial Court had submitted to the jury, on the ground that Petitioners had waived those points because no assignments of error in a motion for new trial had been submitted to the trial Court as required by Rules 324 and 374, Texas Rules of Civil Procedure.[1]

---

[1] For convenience of this Court, pertinent portions of Rules 324 and 374, Texas Rules of Civil Procedure, are as follows:

RULE 324 — "In all cases tried in the county or district court, where parties desire to appeal from a judgment of the trial court, a motion for new trial shall be filed as prerequisite to appeal; provided that *neither a motion for new trial nor an assignment* therein shall be a prerequisite to the right to complain on appeal of the action of the court in giving a peremptory instruction, or *in withdrawing the case*

On motion for rehearing timely filed in the Court of Civil Appeals, Petitioners pointed out that Rule 324 only required assignments of error in a motion for new trial filed in the trial Court on issues submitted to a jury and that as none of the matters complained of by the first sixteen points in Petitioners' brief filed in the Court of Civil Appeals were submitted to a jury, Rule 324 specifically exempted the necessity of such assignments. Petitioners specifically complained therein in their Eleventh Assignment of Error that the action of the Court of Civil Appeals in failing to consider their first sixteen points on their merits was arbitrary and was a denial of due process of law.

Petitioners' view, respecting the supposed waiver of the disputed points of error was shared by Respondents, who candidly in their reply to Petitioners' motion for rehearing in the Court of Civil Appeals, agreed that Petitioners had, indeed, complied with Rule 324 and joined Petitioners in urging the Court, in the following language, to consider the disputed points, to-wit:

> "We are of the view that it was not required, in a case of this nature, that these alleged errors of the trial Court be assigned in a motion for new trial in order to preserve them for review by this Honorable Court. We are still of this opinion, with all deference to Your Honors' differing view as expressed in its opinion of June 6, 1973." Cit-

---

from the jury and rendering judgment . . .; nor shall a motion for new trial be required in a non-jury case. . . ."

RULE 374 — "The motion for new trial, *when required to be filed under these rules,* shall constitute the assignments of error on appeal or writ of error. A ground of error not distinctly set forth in the motion for new trial, *in cases where a motion for new trial is required* shall be considered as waived. Complaint of the action of the court on all matters arising under circumstances where a motion for new trial is not required by these rules, if relied upon on appeal, *shall be included in the statement of points in the brief* as hereinafter provided, *and in such cases no assignments of error shall be necessary."* (Emphasis Ours).

ing *Gevinson et al v. Manhattan Construction Company of Oklahoma et al*, 449 S.W. 2d 458 (Tex. S. Ct.) (1969)

Petitioners' motion for rehearing in the Court of Civil Appeals was overruled on July 3, 1973 and thereafter on August 2, 1973 Petitioners timely filed their application for writ of error to the Supreme Court of Texas, where in their Ninth Assignment of Error they complained that the failure of the Court of Civil Appeals to consider their first sixteen points on their merits was a denial of due process of law as guaranteed by the Constitution of the State of Texas and the United States.

On the 17th day of October, 1973, the Texas Supreme Court refused Petitioners' application for writ of error with the notation "No reversible error (N.R.E.)," Appendix C. Within the prescribed time, Petitioners filed their motion for rehearing in the Supreme Court which again, as one of the grounds, urged that the failure of the Court of Civil Appeals to consider the disputed sixteen points of error on their merits was a denial of due process of law, as guaranteed by the Constitution of the State of Texas and of the United States. This motion for rehearing was overruled by the Supreme Court of Texas on December 5, 1973, and Petitioners had thus exhausted their State remedies. (Appendix C).

On the 20th day of December, 1973, Petitioners filed an application in the Court of Civil Appeals of Texas to recall the mandate issued by that Court on the 19th day of December, 1973 and to stay the effectiveness thereof in order that Petitioners might pursue a petition for writ of certiorari to this Court

and on January 9, 1974, the Court of Civil Appeals in a Per Curiam Opinion granted the application to recall the mandate and to stay the effectiveness thereof but only did so until February 1, 1974 or mandate would automatically issue, which in effect cut thirty-five (35) days from the time allowed by Title 28 U.S.C., Sec. 2101, which allows ninety (90) days from the date of the final judgment or order of the Court of last resort in the State Judiciary System within which to file an application for writ of certiorari.

The Court of Civil Appeals in its Per Curiam Opinion, Appendix D, stated that Petitioners "*now* contend that they have been denied due process of law" because it refused to consider the sixteen disputed points of error as required by Rule 324, Texas Rules of Civil Procedure and thus no federal question was presented to be considered by the State Appellate Courts. If the Court of Civil Appeals meant that the question of lack of due process of law was first raised in Petitioners' motion to recall the mandate, then such statement is absolutely incorrect since it was raised in Petitioners' motion for rehearing in that Court on the 21st day of June, 1973 in their Eleventh Assignment of Error therein. This was the first time that Petitioners could have raised the point. This motion for rehearing was overruled on the 3rd day of July, 1973 by a written opinion, presented *infra* as Appendix B, without any reference made concerning Petitioners' complaint of lack of due process of law by reason of the refusal to consider the disputed sixteen points.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT BELOW DIRECTLY CONFLICTS WITH THE DUE PROCESS OF LAW PRINCIPLES ENUNCIATED BY THIS COURT IN *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S. Ct. 451 (1930) AND *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163.

In Texas the right of appeal from an adverse judgment of the District Court to a Court of Civil Appeals is absolute. Article 2249, Revised Civil Statutes of Texas. It has been held that the right of appeal imports the corresponding duty upon the Court of Civil Appeals to accord such review fairly and impartially in light of the record, *Reyna v. State*, 206 S.W. 2d 651 (Austin C.A.) (1947) (No Writ Hist.), and that Courts of Civil Appeals will zealously safeguard the rights of litigants to appeal. *Casray Oil Corporation v. Royal Indemnity Company*, 165 S.W. 2d 244 (Galveston C.A.) (1942) (Aff'd Tex. S. Ct. in 141 Tex. 33, 169 S.W. 2d 955).

When this case was tried in District Court, by means of pre-trial procedures, the trial judge determined there would be only one jury issue, that being the minor issue of the residence of one of the County Board members. All the rest of the matters raised by the disputed points in Petitioners' brief in the Court of Civil Appeals were tried by the trial Court *after the Jury had been discharged*. Thereafter judgment was rendered by the trial Court based on the Jury's findings on the issue submitted and on the Court's findings on the evidence he heard. The Court of Civil Appeals held that Petitioners waived the disputed points because they were not included in any assignments of error in a motion for new trial in the trial Court.

Until the Court of Civil Appeals' opinion of June 6, 1973, in the case at bar, Appendix A, *in cases where the trial Court had submitted some issues to the jury and had ruled as a matter of law on other issues,* the Supreme Court of Texas and other Texas Courts of Civil Appeals, had uniformly construed Rule 324, Texas Rules of Civil Procedure, as *not requiring assignments of error in a motion for new trial on the matters which the trial Court withdrew from the jury and ruled on as a matter of law.* In support of this statement, Petitioners cite three cases directly in point with the case at bar, which show that the procedure which Petitioners followed in perfecting their record for appeal in this cause had been the law in Texas for at least thirty (30) years. The cases are *First National Bank in Graham v. Corbin,* 153 S.W. 2d 979 (Ft. Worth C.A.) (1941) (Writ Ref. W.M.), *Smock v. Fischel,* 207 S.W. 2d 891 (Tex. S. Ct.) (1948), *Gevinson et al v. Manhattan Construction Company of Oklahoma et al,* 449 S.W. 2d 458 (Tex. S. Ct.) (1969).

These cases will be briefly discussed in the order above given. The rule involved in *Corbin* was formerly Rule 71A which is the same rule and is now designated by the rules of civil procedure as Rule 324. There a jury was empaneled and two questions were submitted. The jury answered only one question and failed to answer the second. There, as in the case at bar, the Court discharged the jury and the proceedings continued. At the conclusion of the trial, the Court entered judgment reciting the jury issues and the one answer but gave no indication as to whether or not the jury answer was disregarded or whether or not the case was withdrawn or whether the judgment was rendered on the verdict of the jury. The identical question was

raised in *Corbin* on appeal as was raised here, that being whether it was necessary for a motion for new trial to be filed as a prerequisite for appeal. The Fort Worth Court of Civil Appeals in *Corbin* held no motion for new trial was required and stated at page 981:

> "We feel that justice requires that Appellants be not deprived of an appeal under the peculiar facts presented by this record."

In *Smock* the trial Court withdrew defendant's cross-action from the jury and rendered a judgment against him. Defendant made no assignments of error in a motion for new trial complaining of the action of the trial Court on his cross-action. The Supreme Court of Texas in reversing both the trial Court and the Court of Civil Appeals held *that Rule 324 did not require the filing of a motion for new trial as a prerequisite to appeal since the trial Court withdrew defendant's cross-action from the jury* and rendered judgment against him and defendant therefore *"had the right to complain of this error for the first time in his brief in the Court of Civil Appeals."* Citing Rule 374. (Emphasis Ours). This was the identical procedure Petitioners followed in presenting the disputed sixteen points in their original brief in the Court of Civil Appeals.

In *Gevinson* "The trial court held that Manhattan *was entitled to the partnership interests as a matter of law, and the remainder of the judgment* [*was*] *based on the jury's verdict.*" The Supreme Court held, at page 461, contrary to plaintiff's contention there (and contrary to the holding of the Court of Civil Appeals here) that *"an assignment in a motion for new trial* [*was*] *not a prerequisite to the right to complain on appeal*

of the action of the trial court in withdrawing the claim for the partnership interests from the jury and rendering judgment thereon for the plaintiffs." Citing Rule 324. (Emphasis Ours). — None of these cases had been overruled at the time Petitioners were perfecting their appeal.

Petitioners submit that from the face of the record, the obvious and inescapable conclusion is that they complied with Rule 324 in accordance with the construction thereof by the Texas Judiciary in effect when Petitioners were perfecting their record for appeal in this case. If this premise is invalid, Petitioners concede that the constitutional question does not arise. But the premise is valid and being so, it fosters the constitutional question presented here, it is:

> "Where Petitioners perfected their appeal in state court in accordance with certain rules of procedure as previously construed by state appellate decisions, does a different construction of the rules enunciated in Petitioners' case for the first time, resulting in their appeal not being heard, deprive them of due process of law as guaranteed by the United States Constitution?"

This Court has consistently answered this question in the affirmative.

The Court of Civil Appeals in its Per Curiam Opinion on January 9, 1974, Appendix D, said that its refusal to consider Petitioners' sixteen disputed points on their merits raised "no federal question" but was "strictly a question of Texas procedure."

This is a basic misconception of the law because the right to be heard is an inextricable element of due process, as guaranteed by the United States Constitution. *In re Oliver,* 333 U.S.

257, 68 S.Ct. 499; *Brown v. New Jersey*, 175 U.S. 172, 20 S.Ct. 77. "But, while it is for the state courts to determine the adjective and substantive law of the state, they must, in so doing, accord to the parties due proces of law." *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451. Nor is the State Court's opinion final on a claim arising under the federal Constitution. *Ibid.* Further, novelty in procedural requirements will not be permitted "to thwart review in [the Supreme Court] applied for by those *who, in justified reliance upon prior decisions, seek vindication in state courts of their constitutional rights.*" *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449, 78 S.Ct. 1165 (1958).

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451 and *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163 (1958) are imminently in point with the case at bar and they will be briefly discussed in the order cited.

In the *Brinkerhoff* case, plaintiff challenged a Missouri Tax Statute. In a prior case, the Missouri Supreme Court held that the State Tax Commission had no power to grant relief from the tax. Relying on this decision, Plaintiff sought relief by a suit to enjoin collection of the taxes. On appeal the Missouri Supreme Court overruled its prior holding and held that plaintiff was not entitled to injunctive relief because it had failed to seek relief before the Tax Commission. The possibility of this remedy had never been suggested by party to the litigation until the Missouri Supreme Court opinion. *It was then too late for plaintiff to complain to the Tax Commission* under the pro-

cedure outlined by the Missouri Supreme Court. Plaintiff then filed a petition for rehearing alleging that due process of law clause of the Fourteenth Amendment had been violated. This Court in reversing and remanding the case held that the practical effect of the Missouri Supreme Court judgment was to deprive the plaintiff of property *"without affording it at any time an opportunity to be heard in its defense."* This Court further noted that it was not concerned with the rights of the plaintiff on the merits or with the accuracy of the State Court's construction of the statute either in the prior case, on which the Plaintiff had relied, or in the case at bar, but the only concern was *"whether the plaintiff had been accorded due process in the primary sense — whether it has had an opportunity to present its case and be heard in its support."* This Court further noted that, whether acting through the judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right which the State has no power to destroy unless there is or was afforded to him some real opportunity to protect it.

In the N.A.A.C.P. case, *supra,* the State of Alabama obtained an order from the trial Court for the production of the membership list of the N.A.A.C.P. in Alabama. This was refused and a contempt judgment was entered against the N.A.A.C.P. The N.A.A.C.P. then applied for a writ of certiorari to the Alabama Supreme Court to review the contempt adjudication. That Court, in an abrupt departure from its prior decisions on similar cases, held that writ of certiorari was not available as a method to review the contempt judgment and held that relief should have been sought by way of *mandamus*

to quash the discovery order prior to the contempt adjudication, however, this newly found remedy was likewise not available at the time the Court discovered it. In none of the prior decisions had there been any intimation by the Alabama Supreme Court that the *exclusive* remedy for reviewing court orders after disobedience of them was by mandamus. This Court, in reversing and remanding the case, further held that the N.A.A.C.P. had the right to rely on the prior decisions of the Alabama Court in which remedy by certiorari had been the approved method of review.

Applying the principles of *Brinkerhoff* and *N.A.A.C.P., supra,* here, it is obvious that the newly declared construction of Rule 324, first announced in Petitioners' case, denied them the right to "present [their] case and be heard in its support" and therein lies the federal question and this Court's jurisdiction.

2. THE PER CURIAM OPINION OF THE COURT OF CIVIL APPEALS (APPENDIX D) AND THE ORDER OF THE SAME COURT CONDITIONALLY STAYING THE ISSUANCE OF THE MANDATE (APPENDIX E) PRESENT IMPEDIMENTS TO PETITIONERS' RIGHT TO PURSUE ITS CONSTITUTIONAL REMEDIES UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Court of Civil Appeals' Per Curiam Opinion of January 9, 1974 is as unique as it is unwarranted. On the one hand it recognizes the absolute right Petitioners have to pursue review of its decision by this Court and in the next breath, upon no legal, ethical or moral grounds, it severely curtails the time within which to perfect the right. The stated reason was because "this case has been in the Courts for

nearly four years." Actually this case has only been in the Court since August 13, 1971. It being the second law suit filed in this matter. The first abortive attempt at annexation by Respondent County Board, was nullified by the Court of Civil Appeals in San Antonio because residents of Petitioner, Toyah School District, were ordered from the meeting room in which Respondents were considering and voting to annex Toyah School District to Pecos School District. This was a flagrant violation of the Texas open-meetings law, and the San Antonio Court held that it was an "illegal meeting." The opinion of the San Antonio Court of Civil Appeals sets forth in explicit detail the brusque and authoritative manner in which the hearing was conducted and such opinion was reported in 466 S.W. 2d 377.

Thus Petitioners have been penalized because they were successful in setting aside the first annexation order and in pursuing their legal rights which they did so successfully.

While the ultimate result may be annexation, Petitioners were nevertheless entitled to have a fair and impartial review before an unbiased tribunal. *In re Murchison,* 349 U.S. 133, 75 S. Ct. 623. The unwarranted disregard of their points of error, whereby they were denied review, was a denial of due process and the unwarranted limitation on the time for the preparation for review in this Court, make its contribution to the same result and is likewise a denial of due process.

CONCLUSION

For these reasons, a writ of certiorari should be issued to

review the judgments and opinions of the Court of Civil Appeals, Eighth Supreme Judicial District of Texas.

Respectfully submitted,

GEORGE HUME COFER,
1408 Capitol National Bank,
Austin, Texas 78701,

Attorney for Petitioners.

Of Counsel:

MAX E. RAMSEY,
415 N. Grant,
Odessa, Texas 79760,

A. R. ARCHER, JR.,
P. O. Box 265,
Monahans, Texas 79756.

CERTIFICATE OF SERVICE

I hereby certify that I have served three exact copies of the foregoing Petition for Writ of Certiorari on the Honorable John F. Tomlin, P. O. Box 750, Pecos, Texas, 79772, Attorney of Record for Pecos-Barstow Consolidated Independent School District, et al., by forwarding same via First Class United States Certified Mail — Return Receipt Requested, together with sufficient postage thereon this the ..... day of ..... , 1974.

.....
A. R. Archer, Jr.

STATE OF TEXAS
COUNTY OF DALLAS

BEFORE ME, the undersigned authority, on this day personally appeared A. R. Archer, Jr., who states that every allegation of fact in the foregoing Certificate of Service is true and correct.

.....
Notary Public in and for Dallas County, Texas

APPENDIX A

Court of Civil Appeals at El Paso

No. 6294

TOYAH INDEPENDENT SCHOOL DISTRICT, et al.,
Appellants,

v.

PECOS-BARSTOW CONSOLIDATED
INDEPENDENT SCHOOL DISTRICT, et al.,
Appellees.

Appeal from the District Court of Reeves County, Texas

OPINION

This was a suit brought by Appellants seeking to set aside an order whereby Appellee, Reeves County Board of School Trustees, on August 13, 1971, annexed Appellant, Toyah Independent School District, to Appellee, Pecos-Barstow Consolidated Independent School District. Following trial to a jury, the District Court of Reeves County rendered judgment sustaining the order of annexation. We affirm.

Appellants contended that Don Weinacht, a member of the Reeves County Board of School Trustees, had vacated his office on such Board by moving from the precinct from which he was elected. They cite Section 17.02, Texas Education Code, which provides that the county board shall be made up of five members, one of whom shall be elected from each of four commissioners precincts and one from the county at large; Section 17.05(2) of the Code then provides that "The four

persons representing commissioners precincts must each reside in the precinct from which he is elected." The annexation action of the County Board was taken on August 13, 1971, and the Court submitted an issue to the jury as to whether Weinacht resided on that date in the precinct from which he was elected. The jury found that he did so reside.

Appellants' points of error seventeen through twenty-one, inclusive, all relate to the actions of the Court and the finding of the jury in regard to this issue. We are of the opinion that any error in connection with the issue is immaterial for the reason that the issue was improper in the first instance. Weinacht was a duly elected and qualified member of the County Board, having been first appointed and then elected some three years prior to trial. His qualification to hold office could not be determined in this collateral proceeding. Article 6253, V.A.T.C.S., provides for the filing in the name of the State an information in the nature of a quo warranto, when:

> ". . . any person shall usurp, intrude into or unlawfully hold or execute, or is now intruded into, or now unlawfully holds or executes, any office or franchise, or any office in any corporation created by the authority of this State, or any public officer shall have done or suffered any act which by law works a forfeiture of his office, . . ."

Quo warranto is held to be the exclusive remedy afforded to the public by which it may protect itself against usurpation or unlawful occupancy of a public office by an illegal occupant. McFarlin v. State ex rel. Barnard, 272 S.W. 2d 630 (CCA—Waco 1954, ref'd n.r.e.); Hamman v. Hayes, 391 S.W. 2d 73 (CCA—Beaumont 1965, writ ref'd). In a school district enlargement case not unlike the one before us, this Court held

that the authority of a de facto public official and his right to hold office may not be questioned in a collateral proceeding, but should properly be tested in quo warranto proceedings. Pyote Independent School District v. Estes, 390 S.W. 2d 3 (CCA 1965, ref'd n.r.e.). In that case, as in the one before us, the plaintiffs sought to contest the combining of two school districts by the County Board of School Trustees on the grounds that the Board was illegally constituted because one of its members was not legally in office. The basis for the member's disqualification was that he had not been properly elected. This Court said:

> "An attack on the election of a public officer by one not asserting an adverse claim must be made either by a statutory election contest brought within the time provided, or by quo warranto proceedings. To hold otherwise would be to say that a member of some school board, or other corporate body, might be elected and serve for months, or even a year or more, and then his election be contested because of the way he voted or behaved on such board. This is not and never has been the intent of the law."

We also said:

> "Further, it has been held that in order to protect the public and individuals, an officer whose election or appointment might be illegal and invalid is still a de facto official, and such is particularly true where there is an office to fill and an election had at the time and place authorized by statute. Boesch v. Byrom, 37 Tex. Civ. App. 35, 83 S.W. 18 (er. ref.). It is also held that the authority of a de factor official and his right to hold office may not be questioned in a collateral proceeding, but should properly be tested in a quo warranto proceeding. Bowen v. Board of School Trustees, Tex. Civ. App., 16 S.W. 2d 424."

And see Crain v. Adams, 120 S.W. 2d 290 (CCA—Amarillo

1938, n.w.h.), for other authorities and the statement that the rule announced in the Bowen case is so well established that further discussion of it is unnecessary. The points of error relating to this issue are also immaterial for the reason that the record reflects that the order of the County Board had sufficient affirmative votes to pass without the vote of Weinacht. Appellants' points seventeen through twenty-one are overruled.

Appellants' twenty-third point of error is that the Court erred in upholding the annexation order of August 13, 1971, because the act of the County Board was arbitrary and capricious. Point twenty-four is that such order is not based on substantial evidence.

While it is doubtful that point twenty-four is germane to any assignment of error in Appellants' amended motion for new trial, it will be considered in connection with their point number twenty-three. We have reviewed all of the evidence in this regard and find the facts to be such that reasonable men in the honest exercise of their duty could have taken the action here questioned. The contention that they acted arbitrarily and capriciously is without support in the evidence. On the contrary, the action of the County Board is supported by substantial evidence. Pyote Independent School District v. Estes (supra); Rock Island Independent School District No. 907 v. County Board of School Trustees of Colorado County, Texas, 423 S.W. 2d 665 (CCA—Houston (14th Dist.) 1968, ref'd n.r.e.); Barnhart Independent School District v. Mertzon Independent School District, 464 S.W. 2d 197 (CCA—Austin 1971, ref'd n.r.e.); Neill v. Cook, 365 S.W. 2d 824 (CCA—Eastland 1963, ref'd n.r.e., 84 S. Ct. 698). In the last cited case and in the Pyote case, the

facts closely parallel those of the case before us as to disparity between the schools in per student cost, subjects offered, number of students in daily attendance, and related factors. Such factors were held to constitute evidence, under the substantial evidence rule, to justify the annexation order of the County Boards, and we think the same is true here. The Toyah students had a choice of 19 subjects which were actually being taught during the 1971-72 school year, while the Pecos-Barstow District offered a choice of over 50 subjects, including band, vocational agriculture, two foreign languages, and other subjects not offered by Toyah; and costs per student were near $1,500.00 for Toyah and $629.00 for Pecos-Barstow. In ordering the annexation, the Trustees of the County Board were doing what they were authorized to do under Section 19.001, Texas Education Code, and their determination of what is needed and proper under the facts and circumstances being supported by substantial evidence, it should not be disturbed by the Courts. Appellants' points of error numbered twenty-three and twenty-four are overruled.

Appellants' other points of error, other than those enumerated, must be held to be waived as they were not raised in their Amended Motion for New Trial. Under the provisions of Rule 324, T.R.C.P., the filing of a motion for new trial was a prerequisite for appeal in this case, and Rule 374, T.R.C.P., provides:

> "The motion for new trial, when required to be filed under these rules, shall constitute the assignments of error on appeal or writ of error. A ground of error not distinctly set forth in the motion for new trial, in cases where a motion for new trial is required shall be considered as waived. * * * "

Appellants filed a motion for new trial and followed it by an amended motion for new trial, but the points of error set forth in the amended motion relate only to the assignments of error which we have discussed above. Those assignments of error in this Court which were not brought to the attention of the trial Court in the amended motion for new trial must be considered as waived and not preserved for appellate review. Wagner v. Foster, 161 Tex. 333, 341 S.W. 2d 887 (1960); Cain v. Zurich Insurance Company, 426 S.W. 2d 575 (CCA—Dallas 1968, n.w.h.); Cox v. National Life and Accident Insurance Company, 420 S.W. 2d 213 (CCA—El Paso 1967, ref'd n.r.e.); Swafford v. Boyles, 437 S.W. 2d 306 (CCA—El Paso 1969, n.w.h.); Lopez v. Allee, 493 S.W. 2d 330 (CCA—San Antonio 1973, n.w.h.).

The judgment of the trial Court is affirmed.

/s/ STEPHEN F. PRESLAR

Stephen F. Preslar
Associate Justice

Max E. Ramsey, C.J., not sitting.

APPENDIX B

Court of Civil Appeals at El Paso

No. 6294

TOYAH INDEPENDENT SCHOOL DISTRICT, et al.,
Appellants,

v.

PECOS-BARSTOW CONSOLIDATED
INDEPENDENT SCHOOL DISTRICT, et al.,
Appellees.

Appeal from the District Court of Reeves County, Texas

ON MOTION FOR REHEARING

Appellants urge error in our failure to consider their points of error one through sixteen as not being preserved for review because they were not based on assignments of error in their Amended Motion for New Trial. The argument is made that the Court withdrew from jury consideration all issues raised by points one through sixteen, so there was no necessity for a motion for new trial as to them. This contention is made for the first time on Motion for Rehearing, but we will consider it, even though there has prior hereto been no mention of anything being withdrawn from the jury, there is no ruling or order to that effect, and such action is not reflected in the judgment.

As appears in St. Louis Southwestern Railway Company v. Duke, 424 S.W. 2d 896 (Tex. Sup. 1967):

"A motion for new trial is a jurisdictional prerequisite

to appeal from a case tried to a jury, with certain specific exceptions. Rule 324 provides that:

'In all cases tried in the county or district court, where parties desire to appeal from a judgment of the trial court, a motion for new trial shall be filed as a prerequisite to appeal; provided that neither a motion for new trial nor an assignment therein shall be a prerequisite to the right to complain on appeal of the action of the court in giving a peremptory instruction, or in withdrawing the case from the jury and rendering judgment, . . .'"

Appellants rely on this last quoted exception, that no new trial motion is required to complain of the Court withdrawing the case from the jury. But that is not Appellants' assignment of error in this case — they do not complain of the withdrawing of the case from the jury, so that exception has no application here. The Court had before it the question of whether the order of the County Board was supported by substantial evidence, but Appellants pled and now assign as error in points one through sixteen numerous things which they contend caused the Board to be illegally constituted. The errors which they urge are that certain members of the Board had a personal pecuniary interest in their official act of annexation, that certain members of the Board has a bias and prejudice and conflicts of interest, that these matters made the members disqualified and caused the acts of the Board to be void and done in the absence of a quorum, and that a member of the County Board was related to a member of the Pecos School Board. All asserted errors have not been detailed, but it is readily apparent that none of the asserted errors fall within any exception provided by Rule 324, hence it was necessary that they be preserved by motion for new trial.

The trial procedure was unique, for it appears from the court reporter's notes in the statement of facts that at a point in the presentation of evidence the jury was retired to deliberate and thereafter the presentation of evidence continued. This is what Appellants say is a withdrawing of the case from the jury. There was no ruling or order, so no objections, and, as indicated, what transpired is found only in the statement of facts. The judgment is one which can only be described as the usual form for a judgment following jury trial. And, as indicated, Appellants filed a motion for new trial and supplanted it by an amended motion for new trial, and the Court entered its order overruling the amended motion. Appellants perfected their appeal based on the date of the order overruling the amended motion for new trial as distinguished from the date of judgment. In that amended motion they asserted errors which were brought forward as points of error on appeal and were considered per our opinion. In addition to those asserted errors, Appellants urged their points one through sixteen which were not in their amended motion for new trial. We adhere to our original ruling that such points were not preserved for appellate review. In construing Rule 324, and its predecessor Rule 71a, the Supreme Court has repeatedly held that any errors complained of during trial (other than the exceptions in the Rule), must be repeated in a motion for new trial. As Justice Greenhill stated the Rule in St. Louis Southwestern Railway Company v. Duke (supra):

> "This Court deliberately chose the interpretation that with exceptions set out in the rule, the errors complained of must be repeated in a motion for new trial.",

Justice Greenhill was referring to the case of Stillman v. Hirsch,

128 Tex. 359, 99 S.W. 2d 270 (1936), and he noted that the Rule was reaffirmed by the Supreme Court in Wagner v. Foster, 161 Tex. 333, 341 S.W. 2d 887 (1960).

The motion for rehearing is overruled.

/s/ STEPHEN F. PRESLAR

Stephen F. Preslar,
Associate Justice

Max E. Ramsey, C.J., not sitting.

APPENDIX C

October 17, 1973

Supreme Court of Texas

No. B-4161

TOYAH INDEPENDENT SCHOOL DISTRICT, et al.,

v.

PECOS-BARSTOW CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, et al.,

From Reeves County, Eighth District

Application of petitioners for writ of error to the Court of Civil Appeals for the Eighth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Toyah Independent School District et al., and their sureties, Jack Burchard and D. A. Thomason, pay all costs incurred on this application.

December 5, 1973

No. B-4161

TOYAH INDEPENDENT SCHOOL DISTRICT, et al.,

v.

PECOS-BARSTOW CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, et al.,

From Reeves County, Eighth District

Petitioners' motion for rehearing of application for writ of

error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 26th day of January, 1974.

By/ Eugene Cervenka, Deputy

GARSON R. JACKSON, Clerk

APPENDIX D

Court of Civil Appeals at El Paso

No. 6294

TOYAH INDEPENDENT SCHOOL DISTRICT, et al.,
Appellants,

v.

PECOS-BARSTOW CONSOLIDATED
INDEPENDENT SCHOOL DISTRICT, et al.,
Appellees.

Appeal from the District Court of Reeves County, Texas

PER CURIAM OPINION

This case was decided adversely to Appellants by this Court on June 6, 1973. See 497 S.W. 2d 455. Motion for rehearing was denied. The Texas Supreme Court on October 17, 1973, denied the application for writ of error by its order, writ refused, n.r.e. On December 5, 1973, motion for rehearing was overruled and in accordance with the opinion of this Court a mandate was issued to the trial Court.

Appellants have now filed in this Court a motion to recall the mandate and to stay the effectiveness thereof until a Petition for Writ of Certiorari can be presented to The Supreme Court of the United States under Title 28, Section 1257(3), United States Code.

This case involves issues resulting from one school district annexing another. The case has been to the Court of Civil Appeals on two occasions. See 466 S.W. 2d 377 and 497 S.W. 2d 455. Neither appeal involved any federal question and no federal statute was involved. Appellants now contend they have

been denied due process of law because this Court refused to consider on the last appeal sixteen points of error which had not been assigned as error in the amended motion for new trial, as required by Rule 324, Tex.R.Civ.P. This same contention involving strictly a question of Texas procedure, and no federal question, was presented to the Texas Supreme Court in both the application for writ of error and the motion for rehearing without success. The likelihood of review of these State procedural issues by the United States Supreme Court seems very remote. Jackson v. State, 103 Tex.Crim. 318, 280 S.W. 202, at 208 (1925). Nevertheless, Appellants have a right to seek such review, but it is for our Court to determine whether the mandate should be stayed during that further appeal.

This case has been in the Courts for nearly four years. If justice delayed, is justice denied, we propose to deny additional extensive delay, particularly into yet another school year.

Accordingly, Appellants' motion to recall the mandate and stay its effectiveness is conditionally granted on the condition that Appellants file their Petition for Writ of Certiorari on or before February 1, 1974, and if the same is not filed by that date this stay will automatically expire. Further, that if the Petition for Writ of Certiorari be denied the mandate shall automatically issue, and in the event the petition is not acted upon or decided by June 1, 1974, the mandate shall automatically issue. By that time the issues will have been presented to the United States Supreme Court and if any further stay, which will delay the effect of the mandate until into or very near another school year, is to be granted, it must come from that Court not this one.

PER CURIAM

January 9, 1974.

APPENDIX E

Court of Civil Appeals at El Paso

No. 6294

TOYAH INDEPENDENT SCHOOL DISTRICT, et al.,
Appellants,

v.

PECOS-BARSTOW CONSOLIDATED
INDEPENDENT SCHOOL DISTRICT, et al.,
Appellees.

Appeal from the District Court of Reeves County, Texas

This day came on to be heard appellants' motion to recall the mandate in this cause, and to stay the effectiveness thereof pending their petition for Writ of Certiorari to be filed in the Supreme Court of the United States, and the Court having considered the same, is of the opinion that the same should be conditionally granted in accordance with its Per Curiam Opinion this day fied, and in accordance with its Order hereinafter set out, to-wit:

On this the 9th. day of January, A.D. 1974, pursuant to action of this Court in conditionally granting appellants' motion to recall the mandate in this cause, and to stay the effectiveness thereof pending their petition for Writ of Certiorari to be filed in the Supreme Court of the United States, it is ordered that said mandate in this cause, issued by this Court on the 19th. day of December, A.D. 1973, and forwarded to the District Court of Reeves County, 143rd Judicial District of Texas, to

be filed in cause No. 8764, be, and the same is hereby ordered withdrawn from the file in this case in the said District Court of Reeves County, Texas; and the Clerk of the District Court of Reeves County, Texas, is ordered and directed to return the said mandate to this Court's office without delay.

THE STATE OF TEXAS
COUNTY OF EL PASO

I, J. W. Florence, Clerk of the Court of Civil Appeals in and for the Eighth Supreme Judicial District of Texas, do hereby certify that the foregoing on two pages, is a full, true and correct copy of the Court's Order, dated January 9th., A.D. 1974, ordering the withdrawal of the mandate previously issued on the 19th. day of December, A.D. 1973, in the foregoing entitled cause, as the same now appears of record in Volume 16, at Page No. 249 of the Minutes of this Court.

IN WITNESS THEREOF, I hereunto set my hand and affix the seal of said Court at El Paso, this the 9th. day of January, A.D. 1974.

J. W. FLORENCE, Clerk